

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MONTY ELDER and LILLIAN ELDER,)
5))
6 Petitioners,)
7))
8 vs.))
9))
10 DOUGLAS COUNTY,))
11))
12 Respondent.)

LUBA No. 96-243

FINAL OPINION
AND ORDER

13
14
15 Appeal from Douglas County.

16
17 Bill Kloos, Eugene, filed the petition for review.
18 With him on the brief was Johnson, Kloos & Sherton.

19
20 No appearance by respondent.

21
22 GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,
23 Referee, participated in the decision.

24
25 REMANDED 06/17/97

26
27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a two-lot
4 partition with a variance to road improvement standards.

5 **FACTS**

6 The subject property is a 3.49-acre parcel within the
7 Urban Growth Boundary (UGB) but outside the city limits of
8 the City of Myrtle Creek. In 1973, a 2.51-acre portion of
9 the property was conveyed without partition approval. That
10 portion of the property is vacant. The remaining .98-acre
11 portion is developed with a single family residence.

12 The subject property fronts a private graveled road
13 easement known as Norton Lane. The county's Land Use and
14 Development Ordinance (LUDO) 4.100.5(b)(3)(a) requires that
15 private roads within UGBs may serve not more than three
16 units of land.¹ The LUDO standards for private roads
17 require that private urban roads may serve a maximum of
18 three lots and must have a minimum width of 25 feet. LUDO

¹LUDO 4.100.5(b)(3)(a), states:

"In 'Urban Unincorporated' areas designated on the Comprehensive Plan, a unit of land may have access by way of a private road upon findings by the Approving Authority that such road provides access for not more than three (3) units of land and service to adjacent areas or additional units of land is prevented by conditions specified in paragraph (1)(d) of LUDO Section 4.11.5.b."

1 4.420, Table 3.² Norton Lane is currently 16 feet in width
2 and serves 21 residences.

3 The applicant before the county owns the 2.51-acre
4 portion of the property and proposes to develop it with a
5 residence. The applicant did not own the property at the
6 time of the illegal conveyance, but knew when he purchased
7 the property that it had not been legally partitioned. In
8 order to develop the property, the applicant applied to the
9 county for a partition to legalize the 1973 conveyance. One
10 of the county's partition criteria requires compliance with
11 the road improvement standards. Because Norton Lane does
12 not meet those standards, the applicant requested a variance

²The property is also subject to a "Right-of-Way Protection Overlay" for Norton Lane to facilitate future development of that road. Although private, Norton Lane is classified by the county as a "minor collector." The county staff report states that a minor collector requires a right-of-way width of sixty feet. The right-of-way protection overlay requires that partitions of land subject to the overlay be conditioned upon a requirement that the property owner

"(1) dedicate, irrevocably offer to dedicate or irrevocably offer to sell the right-of-way necessary to develop the designated streets for their full length adjacent to or through the property to be divided; and (2) improve the rights-of-way to local or minor collector standards, as appropriate, for the length of any street necessary to serve the lots or parcels being created." Douglas County Comprehensive Plan, Land Use Element, Policy No. 3, Objective F.

The county's decision includes a condition requiring compliance with the dedication component of this policy. The decision does not address the second component. Petitioner does not assign error regarding compliance with this policy.

1 to that partition criterion.³

2 The applicable variance criteria of LUDO 4.450 state:

3 "1. Where extraordinary hardship would result
4 form strict compliance with this [Land
5 Division] chapter, variances from the
6 requirements of the Chapter may be granted so
7 that substantial justice may be done,
8 provided that the public interest is
9 protected. * * *

10 "2. A variance to the requirements of this
11 chapter may be approved where all of the
12 following criteria are found to exist:

13 "a. Exceptional or extraordinary
14 circumstances apply to the property
15 which do not apply generally to other
16 properties in the same zone or vicinity
17 which result from lot size or shape,
18 topography or other circumstances over
19 which the property owner since the
20 enactment of this ordinance has had no
21 control.

22 " * * * * *

23 "c. The variance would conform with the
24 purposes of this ordinance and would not
25 be materially detrimental to property in
26 the same zone or vicinity in which the
27 property is located, or otherwise

³The applicant submitted two separate applications, one for the partition and a second for the variance to the partition requirements. The county treated them as a single application for a partition with a variance. The staff report explains the scope of the requested variance as follows:

"Because the subject access, Norton Lane, currently serves twenty-one users the road system does not meet the improvement requirements [of LUDO 4.100.5(b)(3)(a)]. The applicant has requested a variance to the road improvement standards to allow the proposed partition to occur without further improvements to Norton Lane." Record 65.

1 conflict or reasonably be expected to
2 conflict with the Comprehensive Plan.

3 "d. The variance is the minimum variance
4 which would alleviate the difficulty.

5 "e. The variance is not the result of a
6 self-created hardship."

7 The county planning commission granted the variance and
8 approved the partition application. Petitioners appealed
9 the approval to the board of commissioners. The LUDO
10 requires that at least two commissioners must agree to
11 amend, reverse or remand a planning commission decision.
12 The commissioners could not reach such agreement, and
13 therefore ordered that the planning commission decision
14 would stand.⁴

15 This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioner contends the county's findings of compliance
18 with the "extraordinary circumstances" standard in LUDO
19 4.450(2)(a) misinterprets and is contrary to the law, is

⁴The planning commission adopted and incorporated into its decision the "findings of the staff report." Record 11. As we read the planning commission decision, it adopts only that section of the staff report labeled "Findings." To the extent the planning commission may have intended to adopt more than the "Findings" section, it did not make that intent sufficiently clear for us to understand the intended scope of its findings. Spencer Creek Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 96-079, January 31, 1997), slip op 4; Johnson v. Lane County, ___ Or LUBA ___ (LUBA No. 95-207, August 19, 1996). Therefore, we consider as the county's final decision, the board order that adopts the planning commission decision (Record 8-9), the planning commission findings and decision (Record 10-12), and the findings section of the staff report (Record 68-71).

1 based on inadequate findings, and is not supported by
2 substantial evidence in the record.

3 The county's findings of compliance with this
4 requirement state:

5 "Exceptional circumstances apply to the property
6 which do not apply generally to other properties
7 in the same zone in that Norton Lane is a
8 substandard road which does not meet the County
9 public road standards and improvement to such
10 standards within the existing right-of-way would
11 not be possible." Record 68.

12 The essence of this finding is that the "exceptional
13 circumstances" are that the road does not meet the public
14 road standards, and that it cannot meet the standards
15 without increasing the right-of-way. As petitioner states,

16 "This finding is fatally infirm. Its most basic
17 shortcoming is that it finds that the exceptional
18 circumstances are the need for the variance from
19 the road standards. This is akin to saying that
20 the existence of the road standards creates the
21 need for a variance from those standards."
22 Petition for Review 6.

23 Petitioner also argues, and we agree, that this finding
24 is impermissibly conclusory. It does not provide any
25 interpretation of "extraordinary circumstances," as the
26 county applies that term. It does not provide a
27 "justification of the decision based on the criteria,
28 standards and facts set forth" as required by ORS
29 215.416(9). It also is not supported by substantial
30 evidence. It contains no discussion or evidence to support
31 a conclusion that the exceptional circumstances result from

1 circumstances over which the owner has no control or that
2 the circumstances do not apply to other properties in the
3 same zone. As petitioner explains, the subject property is
4 surrounded by similarly zoned R-1 (single family
5 residential) properties on three sides, and all of the
6 properties are similarly situated in that their access is by
7 Norton Lane. The county's finding contains no discussion or
8 evidence to support a conclusion that the circumstances of
9 the subject property are any different from those of the
10 surrounding properties.

11 The first assignment of error is sustained.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner contends the county's findings of compliance
14 with the "materially detrimental" standard in LUDO
15 4.450(2)(c) misinterprets and is contrary to the law, is
16 inadequate, and is not supported by substantial evidence in
17 the record.

18 The county's finding of compliance with LUDO
19 4.450(2)(c) states:

20 "It is the purpose and intent of the Douglas
21 County Comprehensive Plan and Land Use and
22 Development Ordinance to bring that which violates
23 the ordinance into compliance. The variance to
24 road standards would make possible approval of the
25 proposed partition, thereby rectifying the
26 existing violation. The proposed partition and
27 accompanying variance to road standards are,
28 therefore, consistent with the intent and purpose
29 of the Plan and Ordinance. The variance would not
30 be materially detrimental to property in the same
31 zone or vicinity, as it will support improvement

1 of Norton Lane. If the proposed partition and
2 variance are approved, the applicant will be
3 required to execute an irrevocable offer to sell
4 thirty feet (30') of right-of-way from the
5 centerline of Norton Lane, and to execute an
6 agreement to participate in a private maintenance
7 program and a waiver of objection to assessment to
8 ensure such participation." Record 69.

9 Petitioner argues, and we agree, that this finding is
10 inadequate, in part, for failure to identify the applicable
11 purpose and intent section. As petitioner points out, there
12 are at least three "purpose and intent" sections in the LUDO
13 that potentially are applicable to the requested variance.
14 The county must identify which, if any, of these apply here.
15 If the county then interprets each of the purpose and intent
16 sections it finds applicable to have the same meaning, i.e.,
17 "to bring that which violates the ordinance into
18 compliance," the county must provide some explanation of the
19 inter-relationship between the applicable sections, and
20 explain how the language of the applicable sections relates
21 to the county's interpretation.

22 The finding is further inadequate because it does not
23 address the primary impact of the variance. Petitioner
24 argued before the county, and again here, that the variance
25 to the partition criterion requiring compliance with road
26 improvement standards would have a detrimental impact
27 because the partition will create an additional buildable
28 lot on Norton Lane. Although the county staff report
29 acknowledges the additional residence allowed by the

1 partition will create an impact, it makes no finding as to
2 how this additional residence affects compliance with the
3 detrimental impact standard.⁵ We agree with petitioner that
4 the impact of an additional buildable lot along Norton Lane
5 must be evaluated to determine whether a variance to this
6 partition requirement will create a detrimental impact.

7 The second assignment of error is sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner contends the county's findings of compliance
10 with the "self-created hardship" standard in LUDO
11 4.450(2)(e) misinterprets and is contrary to the law, is
12 based on inadequate findings, and is not supported by
13 substantial evidence in the record.

14 The county's finding regarding LUDO 4.450(2)(e) states:

15 "The violation of the subject property occurred in

⁵The staff report explains the effect of the partition as follows:

"There are currently twenty-one users served by Norton Lane. The proposed partition would create the potential for the development of one additional dwelling. One additional single family dwelling would increase the average number of vehicle trips per day by approximately 10 trips per day." Record 63.

In evaluating the requirement from which the variance was granted, the staff report states:

"Approval of the requested variance to road standards will allow the development of one additional parcel along Norton Lane without further improvements to the road. Therefore, it is reasonable to require assurance that the road will be maintained at its current level of improvement or better. The applicant shall agree to participate in a private maintenance program for Norton Lane and shall execute a waiver of objection to assessment to ensure such participation." Record 65.

1 1973 when the titleholders at that time * * *
2 conveyed a portion of the property * * *. The
3 violation occurred prior to the current
4 titleholder's ownership." Record 70.

5 This factual finding is inadequate to establish
6 compliance with LUDO 4.450(2)(e) in that it does not reach
7 any conclusions regarding compliance with that standard.
8 The facts recited do not in themselves establish that the
9 need for the variance to the road improvement standards to
10 allow the partition is not the result of a self-created
11 hardship.

12 Even if this finding could be read to find that the
13 hardship was not self-created because it occurred prior to
14 the current titleholder's ownership, the county has provided
15 no interpretation of "self-created hardship." As petitioner
16 argues, the implication in the county's finding, that the
17 hardship is not self-created because the applicant did not
18 own the property when it was illegally conveyed, could
19 render the standard meaningless:

20 "If the illegal partition had been an illegal
21 conveyance by the Applicant, there would be no
22 question that the hardship would have been self-
23 created. Here the Applicant purchased from his
24 predecessor knowing that the property had been
25 illegally divided. The hardship is necessarily
26 still self-created. The applicant did not need to
27 purchase the property. Knowing that it was
28 illegally divided, he could have declined to
29 purchase. In a more basic sense, however, the
30 'self-created hardship' standard must necessarily
31 be read to mean that the actions of the
32 predecessors in title are attributed to the
33 successors in title. Any other interpretation
34 would render this variance standard a nullity.

1 That is, any violation of the zoning code could be
2 cured by the mere passing of title to another
3 person. At that point, the new owner would have a
4 parcel not in compliance with a substantive
5 provision of the code, but would have a right to a
6 variance to legitimize the code violation. This
7 would not leave any teeth in the code. It would
8 encourage code violations and reconveyance to
9 bless the violations." Petition for Review 11-12.

10 We find petitioner's observations regarding the "self-
11 created hardship" standard to be reasonable. However, it is
12 for the county, and not the petitioner or this Board, to
13 interpret its own standards, and based upon its
14 interpretations, to apply the criteria to the facts in the
15 record in the form of findings. The county has not done so
16 here.

17 The third assignment of error is sustained.

18 The county's decision is remanded.